

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

ELLIOT MCGUCKEN, an individual,

Plaintiff,

v.

NEWSWEEK LLC, a New York Limited
Liability Company; and DOES 1-10, inclusive,

Defendants.

Civil Action No.: 1:19-cv-09617-KPF

**DECLARATION OF SCOTT ALAN
BURROUGHS, ESQ.**

DECLARATION OF SCOTT ALAN BURROUGHS, ESQ.

I, Scott Alan Burroughs, hereby declare as follows:

1. I am above eighteen (18) years of age and am competent to give the testimony set forth below. Said testimony is given from my own personal knowledge. I make this declaration in support of Plaintiff's Motion for Summary Judgment. If called as a witness, I could and would competently testify as set forth below.
2. I am a member of the New York Bar admitted to practice before this Court. I am a shareholder of the law firm Doniger / Burroughs, and am lead counsel for Plaintiff Elliot McGucken ("McGucken") in this action.
3. On April 3, 2019, my office sent to Newsweek a cease-and-desist demand. A true and correct copy of the cease-and-desist correspondence is attached hereto as **Exhibit 5**.
4. It is unclear, however, whether this demand was received because Newsweek's email system returned a response stating that email address provided on its site by Newsweek, viz., copyright@newsweek.com, included a "permanent error." Counsel sent the cease-and-desist demand to this address two additional times and all three received this same "permanent error" response from Newsweek. Notably, this is the very email account provided by Newsweek on its website to use in regard to copyright issues. In any event, Newsweek did not remove the Subject Photograph from its site at or around this time. A true and correct copy of this response and a screenshot of the copyright section of Newsweek's website is attached hereto as **Exhibit 6**.
5. Attached hereto as **Exhibit 7** is a true and correct copy of an article titled "Dropshipping Journalism" by Daniel Tovrov, publicly available at

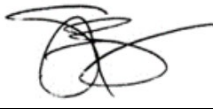
https://www.cjr.org/special_report/newsweek.php, which was accessed and prepared by my office on April 13, 2020.

6. Instagram has publicly stated that that it does not grant sub-licenses to sites like Newsweek that would allow for the exploitation without consent of work appearing on Instagram. Attached hereto as **Exhibit 8** is a true and correct copy of an article titled “Instagram just threw users of its embedding API under the bus” by Timothy B. Lee for *Ars Technica*, publicly available at <https://arstechnica.com/tech-policy/2020/06/instagram-just-threw-users-of-its-embedding-api-under-the-bus/>.
7. Attached hereto as **Exhibit 9** is a true and correct copy of Instagram’s Platform Policy, publicly available at <https://www.instagram.com/about/legal/terms/api/>, which was accessed and prepared by my office on April 13, 2020.
8. Attached hereto as **Exhibit 10** is a true and correct copy of Instagram’s Terms of Use, publicly available at <https://help.instagram.com/478745558852511>, which was accessed and prepared by my office on April 13, 2020.
9. Attached hereto as **Exhibit 11** is a true and correct copy of Instagram’s Community Guidelines, publicly available at <https://help.instagram.com/478745558852511>, which was accessed and prepared by my office on April 13, 2020.
10. Newsweek has provided no evidence that it obtained a sub-license from Instagram to exploit Dr. McGucken’s proprietary photography on its commercial website. And Newsweek has failed to provide evidence that it ever obtained a license or authorization to publish Dr. McGucken’s work on its website.
11. Attached hereto as **Exhibit 12** is a true and correct copy of Newsweek’s intellectual property policies.

12. Attached hereto as **Exhibit 13** is a true and correct copy of relevant portions of the deposition transcript of Diane Rice, Newsweek's Director of Photography. Attached hereto as **Exhibit 14** is a true and correct copy of the relevant portions of the deposition transcript of James Etherington-Smith, Newsweek's Managing Editor.
13. Attached hereto as **Exhibit 15** is a true and correct copy of Plaintiff's expert report by Thomas Maddrey.
14. Newsweek has failed to introduce any evidence reflecting that the use of the Subject Photography constitutes fair use. Attached hereto as **Exhibit 16** is a true and correct copy of Plaintiff's expert report by Lynn Oberlander.
15. Newsweek profited from its exploitation of McGucken's work in several ways, including increased traffic to its site and increased revenues from the paid advertising it displayed alongside the Subject Photograph, new subscribers, and increased page views. Attached hereto as **Exhibit 17** is a true and correct copy of information reflecting Newsweek's page views, unique impressions, and advertising revenue.

I declare under penalty of perjury and the laws of the United States of America that the foregoing is true and correct.

Executed on May 21, 2021 in Brooklyn, New York.

By: 

Scott Alan Burroughs, Esq.
Declarant